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No. 84-1244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SUSAN J. DAVIS, *et al.*,

Appellants,

vs.

IRWIN C. BANDEMER, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

AMICUS CURIAE BRIEF OF THE MEMBERS OF THE CALIFORNIA DEMOCRATIC CONGRESSIONAL DELEGATION

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SUMMARY OF ARGUMENT

Ignoring precedent and every principle of judicial restraint, the district court in this case reached out to do what no federal court has done before. It entered the thicket of partisan politics and decided that a particular redistricting plan offered inadequate opportunities to one of the two major political parties to elect its members to a legislative body. The court attempted to chart a seemingly judicial, non-political course through the political thicket by invoking criteria — "compactness", "proportionality", "competitiveness" and "preservation of municipal boundaries" — that have been advanced by reformers who seek to bring "neutrality" to the frankly political process of redistricting.

Whatever may be said for or against these criteria as a basis for political reform, they fail utterly as neutral, judicially manageable standards for evaluating the competing redistricting claims of the many political interest groups that animate the political life of this country. The ideal of proportionality, while well-served in the representative system of several Continental democracies, is fundamentally at odds with the winner-take-all, district-based system used in the United States; it furthermore ignores the individual features of particular candidates and legislative races, as well as the fact that legislative districts are based on equal numbers of persons, not voters. Compactness, a concept so vague that the reformers themselves have been unable to agree on a workable definition, fails as an index of partisan excess because it, and its converse, are as compatible with districting plans that reformers decree "fair" as with those found wanting in partisan restraint. Compactness also embodies a political value, comparatively disadvantaging concentrated groups of relatively homogeneous voters by "packing" their votes into few districts. The pursuit of marginal or "competitive" districts and the preservation of city and county voting blocs similarly embody political values and are incapable of neutral or systematic implementation.

Reformist criteria also conflict with one another. No reformer has identified any neutral technique for ordering these values or making trade-offs between them and the respective constituencies who would benefit from their implementation. The intractability of these problems has led even many of the reformers to conclude that the reform they seek will have to come either through implementation of a proportional representation system or by taking the process out of the political arena and consigning it to independent commissions. Reform by such means is obviously well outside the realm of constitutional mandate and the charter of the federal courts.

I.
INTRODUCTION

Reapportionment is, simply, the process of organizing a political jurisdiction's individual citizens into a set of equipopulous districts that will elect the jurisdiction's representatives. Any decision about the placement of district boundaries is a decision about the composition of the group of individuals who will comprise a particular district. In the United States, the individuals who make up these districts may belong to any number of salient groups: (1) Republicans, Democrats, and members of the American Independent, Peace and Freedom and American Nazi parties, (2) Blacks, Whites, Orientals, Hispanics, and American Indians, (3) farmers, laborers, businessmen, students, and pensioners, (4) persons of Italian, Armenian, German, Japanese, and Arabic backgrounds, (5) constituents of "special interest" groups concerned with nuclear power, conservation, handguns, moral majority values, renter's rights, and immigration issues, and (6) Mormons, Jews, Baptists, Catholics, and other religious groups. While the geographic distributions of members of these groups can in many cases be ascertained, each group will have a different distribution within a given jurisdiction.

The instant that a legislature or a court places itself at the redistricting drafting table and draws a line, it effects a political result by choosing among an infinite number of ways of distributing members of these groups among districts. Every choice will have differential effects on the various groups in question. As Professor Robert Dixon has observed: "The key concept to grasp is that there are no neutral lines for legislative districts." Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts,* in *Representation and Redistricting Issues* 7-8 (B. Grofman *et al.* eds. 1982).

Since *Baker v. Carr*, 369 U.S. 186 (1962), a number of academics and reformers have turned their attention to redistricting and have urged the federal courts to abandon their limited role as guardians of "mere"[1] population equality in favor of a broader, roving charter to ensure "fairness" or "neutrality" in redistricting.[2] Those who favor judicial policing of gerrymandering are fond of quoting Chief Justice Warren's statement in *Reynolds v. Sims* that: "Fair and effective representation for all citizens is concededly the aim of legislative apportionment." *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964).[3] These reformers frankly see this aim as extending beyond the guarantee of an equal individual vote; instead, they propose that the courts guarantee equal representation and "effectiveness" for the collective votes of competing political interest groups. For such writers, the "gerrymander", equipopulous or otherwise, is the antithesis of "fair and effective representation" for all voting groups.

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[1] These reformers have been frankly impatient with what they see as the Court's preoccupation with numerical equality, which to them pales into insignificance next to what they perceive as the far graver problems of partisan excess. Robert Dixon, the leader of the entire movement, went so far as to label this Court's increasingly stringent equal population decisions a "Pavlovian response." Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, in *Representation and Redistricting Issues* 14 (B. Grofman *et al.* eds. 1982) (hereinafter "*Redistricting Issues*").

[2] For a recent and unrestrainedly enthusiastic recital of the basic contentions, *see* Weinstein, *Partisan Gerrymandering: The Next Hurdle in the Political Thicket?*, 1 J. Law & Pol. 357 (1984). For a more skeptical view, *see* B. Cain, *The Reapportionment Puzzle* (1984); Lowenstein & Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory*, ____ UCLA L. Rev. ____ (1985) (forthcoming).

[3] *E.g.*, R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 17 (1968); Baker, *Threading the Political Thicket by Tracing the Steps of the Late Robert G. Dixon, Jr.: An Appraisal and Appreciation*, in *Redistricting Issues*, *supra* n.1 at 21-22; Dixon, *supra* n.1 at 13.

But the definitions the reformers propose of "gerrymandering" tend to be just as broad and vague as was Chief Justice Warren's formulation. Thus, "gerrymandering" is variously defined as "dilut[ing] the voting strength" of groups of voters,[4] as "excessive manipulation of the shapes of districts,"[5] as creation of an "unjustifiable advantage" for one party,[6] as "discriminat[ion] against" one group,[7] or in more down-to-earth language as "the dishing of one political party by the other."[8]

But voting strength cannot be characterized as diluted unless it can be compared to a level of strength that is agreed to be normal; the drawing of lines cannot be characterized as manipulative unless there is a method of drawing lines that is agreed not to involve manipulation; an advantage cannot be characterized as unjustifiable unless there is an agreed-upon standard of justification; a group cannot be characterized as discriminated against unless a state of affairs is agreed to constitute "neutrality"; and one political group's notion of dishing may well be seen by another such group as the fair, if not inevitable outcome of a neutral and non-manipulative process.

In short, definitions of gerrymandering of the sort just canvassed raise as many questions as they answer. To find

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[4] Engstrom, *Post-Census Representational Districting: The Supreme Court, "One Person, One Vote," and the Gerrymandering Issue*, 7 S.U.L. Rev. 173, 207 (1981).

[5] Backstrom, Robins & Elder, *Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota*, 62 Minn. L. Rev. 1121, 1122 n.7 (1978); *see also* Erickson, *Malapportionment, Gerrymandering and Party Fortunes in Congressional Elections*, 66 Am. Pol. Sci. Rev. 1234, 1237 (1972).

[6] Backstrom, *et al.*, *supra* n.5 at 1129.

[7] Grofman & Scarrow, *Current Issues in Reapportionment*, 4 Law & Pol'y Q. 435, 454 (1982).

[8] Mayhew, *Congressional Representation: Theory and Practice in Drawing the Districts*, in *Reapportionment in the 1970's*, 242, 274 (N. Polsby ed. 1971).

concrete meanings for various reformers' conceptions of gerrymandering, we must consider the specific criteria they have proposed for evaluating legislative districts. If those criteria cannot be demonstrated to be neutral and manageable standards with which to winnow out neutral from non-neutral plans, then they cannot justifiably be urged upon the judiciary as a technique for negotiating the treacherous terrain of the political thicket.

This brief will limit itself to what must surely be the central issue raised by the district court and other enthusiasts of judicial intervention in the partisan disputes of redistricting: whether manageable judicial standards exist for the task. It will demonstrate that there are, in fact, no neutral and judicially manageable standards for resolving competing partisan claims, independent of substantive political conceptions about the public interest and the proper distribution of power in our society.[9]

II.

THERE ARE NO JUDICIALLY MANAGEABLE STANDARDS FOR ADJUDICATING CLAIMS OF PARTISAN GERRYMANDERING

The principal reformist criteria for redistricting include the following:

1. Districts should be compact, according to any of several conflicting definitions of "compact".

2. Districts should unite persons having a "community of interest".

[9] Some commentators have conceded the highly technical nature of some of their mathematical formulations and have even proposed that "the judiciary employ[ ] its own technician to interpret the data." Baker, *supra* n.3 at 140. But the problems transcend mere technique. We are not accustomed to look to computer programs and technicians as a source for political values. For an illuminating survey of the basic theories of democratic representation, *see* H. Pitkin, *The Concept of Representation* (1967).

3. Districts should preserve whole city, county or other political subdivisions "as much as possible".

4. Districts should be "marginal" or "competitive" in order to provide close or hard-fought inter-party contests.

5. Districts should be drawn so that in the next election each party's share of the total available seats will probably be closely or exactly proportional to its share of the cumulative vote.[10]

Section A, *infra*, considers the first three proposed criteria, which can be described as "formal" criteria; the remainder, appropriately described as "result-oriented" criteria, are dealt with in Section B, *infra*.

A. "Formal" Criteria Do Not Yield Judicially Manageable Standards.

1. Compactness.

No doubt the characteristic image brought to the minds of most people when they think of a "gerrymander" is that of the sprawling, odd-shaped, "contorted" district. Even some serious students of districting have clung to this notion. One writer referred to "outlandishly shaped districts" as the "classic tell-tale sign of gerrymandering."[11] The opposite of the "outlandishly shaped district", of course, is the "compact district". If indeed odd-shaped

[10] For a much longer list of proposed criteria, *see* Grofman & Scarrow, *supra* n.7 at 454. Professors Grofman and Scarrow conclude that these criteria are "multiple and conflicting" and suggest that it will fall to the courts to resolve these conflicts. An important new study, B. Cain, *The Reapportionment Puzzle* (1984), contains a chapter, entitled "The Consistency of Good Government Criteria", that catalogues the various reformist criteria and systematically exposes the irreconcilable conflicts between them. *Id.* at 52 *et seq.*

[11] Wells, *Against Affirmative Gerrymandering*, in *Redistricting Issues*, *supra* n.1 at 84.

districts are the sure sign of gerrymanders, then the obvious way to prevent gerrymanders would be to require that districts be compact or, at a minimum, to require a careful explanation for any departure from compactness.[12]

The trouble with this seemingly attractive notion is that there is no basis for the assumption that odd-shaped districts signal gerrymandering, at least if that term is to retain its usual pejorative connotation. Most of the more sophisticated writers on districting have recognized that the presence or absence of compact districts cannot assure either the presence or absence of what they regard as gerrymandering.[13] Compactness is a failure as part of any judicially manageable gerrymandering test.

The principal problems are fourfold. First, there is no credible empirical relationship between neat shapes and the "dishing" of political groups. Indeed, in 1973, this Court rejected challenges to a districting plan of unprecedented ugliness, whose very ugliness was the apparent result of an attempt to achieve partisan fairness. Second, rather than

[12] *See, e.g.*, Weinstein, *supra* n.2 at 376-77.

[13] *See, e.g.*, B. Cain, *The Reapportionment Puzzle* 32-50 (1984) ("there is not only no necessary relation between aesthetic considerations and good government criteria, there is no happy empirical coincidence, either"); Backstrom, *et al.*, *supra* n.5 at 1125-27; Dixon, *supra* n.1 at 16; Engstrom, *supra* n.4 at 214; Grofman & Scarrow, *supra* n.7 at 454; Papayanopoulos, *Compromise Districting*, in *Redistricting Issues*, *supra* n.1 at 63; *see also* Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 Am. Pol. Sci. Rev. 540, 554 (1973).

More enthusiastic but less analytical supporters of compactness assert that the compactness requirement is neutral, but typically do not attempt to defend their assertion. *E.g.*, Note, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. Chi. L. Rev. 398, 412 (1974) (hereinafter "*Political Gerrymandering*"). Even the enthusiasts of compactness often fall back to the weak assertion that it is a desirable "prophylactic measure". *Id.* at 414. But if compactness and "fairness" do not walk hand-in-hand, against what is compactness supposed to be a prophylaxis?

being neutral, compactness tends to disfavor groups, like the urban poor, that live in relatively homogeneous areas in which their highly concentrated votes are "wasted". Third, the literature on the subject includes numerous and indeed conflicting methods of measuring compactness, none of which has won general assent. Fourth, the criterion, however gauged, conflicts with other redistricting criteria, such as the preservation of city and county boundaries, communities of interest, and proportionality. No one has demonstrated any neutral or non-political technique for assigning priorities to or making trade-offs between these conflicting criteria and the political preferences that underlie them.

The notion that odd shapes are a reliable indicator of partisan cloak-and-dagger work is readily refuted by reference to the record in *Gaffney v. Cummings*, 412 U.S. 735 (1973).[14] It was undisputed that the districts in that case were drawn to achieve what the state regarded as a politically "fair" result — rough proportionality between the number of seats won statewide by a party and the number of votes cast statewide for the several candidates of that party. 412 U.S. at 753-54. The "Single Appendix" filed in that case on November 24, 1972 includes twenty-four pages of maps depicting some of the "fair districts" in question. Single Appendix at 153-177. A brief look at those maps is instructive: they depict what are undoubtedly the most bizarrely shaped districts in recent apportionment history, making even the unusual shapes of the districts that this Court reviewed in *Karcher v. Daggett*, 462 U.S. 725 (1983), appear boringly regular.[15]

[14] Significantly, Professor Dixon, the intellectual mentor of the redistricting reform movement, was counsel of record for the parties defending the plan and its "misshapen" districts.

[15] For the Court's convenience, the districts are depicted in Appendix A of this brief.

Just as bizarrely shaped districts may be part of a "fair" plan, neat and regular districts can easily produce results that would fail various reformers' tests for fairness. New Mexico's Congressional districts are the very model of compactness,[16] composed of neat, essentially rectangular county units. In the 1982 Congressional elections, Democrats "carried" the state with 51.37%[17] of the two-party vote; yet this majority won the Democrats only 33.33% of the available three seats, yielding what some reformers would call an 18% "gulf" between seats and votes won. Utah, too, has compact Congressional districts that dutifully trace county lines.[18] In the 1984 elections, however, Democrats won 34.95% of the two-party vote, but were completely shut out of representation in Utah's all-Republican delegation of three Congressmen. *Congressional Quarterly*, April 13, 1985 at 695. Compactness is quite consistent with results which, in the reformers' terms, leave almost 35% of a state's population "without representation". [19]

The essential flaw of the compactness criterion can be seen by imagining a three-by-three grid of nine perfect squares. The nine-district jurisdiction enjoys a political life far simpler than any to be found in the United States; it includes only two salient political groups, the A's and the B's. There are 50 A's and 40 B's. It so happens that as a result of the "natural" or "fortuitous" distribution of the

[16] The Census Bureau's map of the New Mexico districts is reproduced in Appendix B.

[17] These statistics are compiled from the 1983 Congressional Quarterly.

[18] The Census Bureau's map of the Utah districts is reproduced in Appendix C.

[19] Amici are not asserting that these plans are in fact "gerrymanders." But as one political scientist observed: "A committee (of any composition) may comply with all the rules of compactness, contiguity, and such, and still create a masterful gerrymander." Papayanopoulos, *supra* n.13 at 63.

A's and B's, the A's tend to live in clusters while the B's are more evenly distributed across the landscape. The gridwork creates districts populated as follows:

District 1: 4 A's, 6 B's
District 2: 9 A's, 1 B
District 3: 4 A's, 6 B's
District 4: 4 A's, 6 B's
District 5: 8 A's, 2 B's
District 6: 4 A's, 6 B's,
District 7: 4 A's, 6 B's
District 8: 9 A's, 1 B
District 9: 4 A's, 6 B's

Assuming that everyone votes, the result of the neat grid of districts is that the B's secure a two-to-one majority of representatives with a minority of the votes. For a mere 44.5% of the vote, they get 66.6% of the seats. The unfortunate A's get 55.5% of the votes, but only 33.3% of the seats. Thus the relationship between compactness and legislative outcomes depends entirely on the fortuity of the pre-existing geographical distribution of voting groups. Unsurprisingly, the B's will be quite satisfied with a test that makes lack of compactness a constitutional infirmity.

But it would be naive to call the distribution of groups in society a fortuity. As a result of social, economic and political forces, the typical distribution of political units in the United States, especially in the larger industrial states, includes inner city areas with overwhelmingly Democratic, poor and minority populations, and suburban and rural areas that are largely Republican, although not by such clear margins. In the language of redistricting reformers, then, compact districts in urban centers "waste" urban votes by "packing" them into relatively homogeneous districts when "bizarrely shaped" districts linked to outlying areas would make it possible not to "waste" these votes. Similarly, "sprawling districts" can unite separate areas of minority strength into a district where their collective strength can influence an election. *See, e.g.,* B. Cain, *The*

Reapportionment Puzzle, 46-50 (1984).[20] Whether it is desirable to do so, of course, is purely a political question. Indeed, that is precisely the point: compactness is not a neutral criterion and constitutionalizing it would have readily predictable political consequences. To paraphrase George Orwell, compactness is more equal for some people than others.

Even if one were to accept the naive notion that compactness is a neutral criterion that does not express a political preference, there is simply no agreement among reformers about how to determine whether districts are compact. Among the various measures that have been proposed are: (1) the Schwartzberg "adjusted perimeter" test;[21] (2) the Roeck "smallest circle" measure;[22] (3) the Weaver-Hess "moment of inertia" measure;[23] (4) the Boyce-Clark "center of gravity" measure;[24] and a score of others. The differences between these proposed measures are not merely technical. Different measures yield quite conflicting results; the Boyce-Clark measure, for instance, gives a high rating to a coiled, snake-like district that would be censured by a "perimeter" measure, while the Roeck "smallest circle" test would reject the same isosceles triangle that would win high marks from a perimeter test.

[20] *See also* Lowenstein & Steinberg, *supra* n.2. The problem, of course, is not limited to urban or minority groups. "[T]he most innocent districting plan will penalize a party whose voters are either inordinately concentrated (like Michigan Democrats) or inordinately dispersed (like Missouri Republicans)." Mayhew, *supra* n.8 at 276; *see also* A. Hacker, *Congressional Districting,* 56-57 (1964).

[21] Schwartzberg, *Reapportionment, Gerrymanders and the Notion of Compactness,* 50 Minn. L. Rev. 443 (1966).

[22] Roeck, *Measuring Compactness as a Requirement of Legislative Apportionment,* 5 Midwest J. of Pol. Sci. 70 (1961).

[23] Weaver & Hess, *A Procedure for Non-Partisan Districting: Development of Computer Techniques,* 72 Yale L.J. 288 (1963).

[24] Boyce & Clark, *The Concept of Shape in Geography,* Geographical Rev. 561 (1964).

If lack of compactness is grounds for haling a redistricting plan into court, the choice of measure will itself decide which plans will be subjected to litigation. Compactness thus is so vague a redistricting value that even its proponents commonly propose that it must not be "rigidly" applied. Such a vague concept is incapable of providing the judiciary with a manageable path through the political thicket.

Finally, the compactness criterion inescapably conflicts with other reformist redistricting criteria. It has already been seen that compactness can conflict with proportionality. Similarly, although city and county boundaries are notoriously irregular,[25] reformers insist that districts follow these boundaries but also be compact. These objectives cannot be achieved simultaneously. Compactness further will conflict with the notion that districts should comprise communities of interest. Even if there were some non-political method for deciding which citizens share common interests, it takes little reflection to see that interest communities generally fail to confine themselves to boxes, circles or whatever compact shape a reformer might prefer. "No natural law ordains that people with community ties

[25] *E.g., Gaffney v. Cummings, supra,* 412 U.S. at 753 n.18 ("any plan that attempts to follow Connecticut's 'oddly shaped' town lines . . . is bound to contain some irregularly shaped districts.") The California example is also instructive: "The city of Industry looks like the hull of a boat. The city of Monrovia has a narrow appendage with less than a hundred people in that is connected to the main body of the city by a drainage ditch. The City of Los Angeles itself is connected to its port are in San Pedro by a narrow corridor that skirts the cities of Carson and Torrance. Pasadena has stovepipe extension to the north which protrudes up through a reservoir area into unincorporated county land. Commerce, like the city of Industry, is a largely unpopulated industrial area with many jagged sides. The city of Riverside is a mosaic that rivals the most creative efforts of gerrymanderers over the years. This list could be indefinitely extended." B. Cain, *The Reapportionment Puzzle* 46 (1984).

live in areas of regular geometric shape." Mayhew, *supra* n.7 at 273.[26]

A compactness standard, in short, is a resounding failure as a judicial technique for identifying and remedying partisan gerrymanderers.[27] Its principal failure is its very lack of neutrality. This basic failure is compounded by its utter vagueness and its conflict with other proposed redistricting values. A vague compactness criterion, to be considered with other vague and conflicting criteria, threatens to result in courts making, or being accused of making, purely political rulings with only the thinnest veneer of neutral guiding principles. The "classic tell-tale sign of gerrymandering" is a classic red herring.

2. Communities of Interest.

Redistricting reformers are fond of saying that districts should be composed of "communities of interest". This criterion suffers from two principal weaknesses. The first is that, like compactness, the concept is so vague and resistant to definition as to provide no practical guidance to courts; the second is that, even if agreement could be forged about who has common interests with whom, ordering the competing and conflicting claims of various groups who want to share common districts would entail intractable political questions.

[26] For a complete catalogue of these conflicts, *see* Lijphart, *Comparative Perspectives on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements*, in *Redistricting Issues*, *supra* n.1 at 147-52 (hereinafter "*Comparative Perspectives*").

[27] Compactness is sometimes defended as helping to facilitate contacts between a representative and his constituents. But given the ease with which Americans move about today, the size or shape of districts is hardly an impediment to contacts with representatives; in any case, most contacts today occur by telephone or through the franking privilege. B. Cain, *The Reapportionment Puzzle* 32-33 (1984).

On a given political issue at a particular point in time, it may indeed be possible for the judiciary to state with some confidence that certain groups share a community of interest. But once one recognizes that myriad different groups align in myriad different ways on the diverse political issues that arise between decennial redistrictings, the usefulness of the concept ends.[28] Do adjacent low-income black and white neighborhoods comprise a single community of economic interests or two communities defined by diverse racial and social features? Are agricultural areas univocal political communities, or do growers and laborers have divergent interests? If a group has common interests in one area of political life but conflicts in others, should the members of the group be corralled in a single district? Does a single municipality in transition from rural agricultural use to a bedroom community for a nearby city constitute a single interest? Is preserving a municipal unit more important than recognizing the diverse interests it comprises? And what is to be made of the fact that many, if not most, political "communities" are scattered across distant parts of a state? "Emphasizing community can . . . violate the compactness standard. No natural law ordains that people with community ties live in areas of regular geometric shape." Mayhew, *supra* n.8 at 273. "There is, in short, a trade-off between community and each of the other districting values." *Id.* at 273.

Even assuming a neutral or judicially manageable test for identifying and preserving communities of interest, the very assumption that such communities should have common representation hides an important political judgment. Although it is possible to argue that a district composed

[28] *See, e.g.*, Ladd, *The Concept of Community: A Logical Analysis*, in *Community* 272-73 (C. Friedrich ed. 1959) ("[T]here is no single criterion of membership or specific practical consequence thereof which can be used to define 'community' in the practical sense.")

predominantly of one group can be represented most effectively because its mandate to its representative will be clearest,[29] it is equally possible to argue that districting should "immunize the extent to which any representative is able to rely solely on a single interest group for his support," so that the representative will have to rely on a coalition of groups, making him likely to be at once more moderate and more independent of the demands of any one group. Note, *Political Gerrymandering, supra* n.14 at 401. The Constitution does not contain any formula for chosing between these competing views about political representation.[30]

3. Municipal Boundaries.

Avoiding "excessive"[31] splits of city, county and other governmental units is an often-stated goal of districting reformers. As a neutral criterion for judicial evaluation of districting plans, however, this goal fails since, like other such criteria, it is unmanageable[32] and masks political judgments more properly left to the legislative realm.

[29] *E.g.*, Mayhew, *supra* n.8 at 271-73.

[30] The Indiana Democrats in this case, of course, complain that too many of them were packed into two few districts. Thus, they regard too much community of interest as too much of a good thing.

[31] It is well-recognized that there is an inherent tension between the constitutional requirement of equal population and the state policy of maintaining whole city, county and other municipal units. *E.g., Mahan v. Howell,* 410 U.S. 315, 325 (1973); *Reynolds v. Sims, supra* p.4, 377 U.S. at 579-81 (1964). Especially in the post-*Karcher* era, splits of cities and counties are inevitable.

[32] The desire to main whole cities and counties within district boundaries can conflict with (1) the equal population requirement, (2) compactness, (3) the maintenance of communities of interest, (4) preservation of minority voting strength, (5) proportionality, (6) the creation of competitive seats, and other criteria. *See generally* Lijphart, *Comparative Perspectives, supra* n.26 at 147-52; *see also* B. Cain, *The Reapportionment Puzzle,* 69-73 (1984).

The principal justification advanced for preserving whole cities, counties and other governmental units within districts is that these units have common interests which should not be submerged by spreading the unit's voting power over more than one district. B. Cain, *The Reapportionment Puzzle* 60-63 (1984). Quite apart from the empirical weakness of this assumption,[33] pursuit of this goal embodies a political judgment that enjoys no *a priori* justification.

Assume for the moment, however, that a commonality of interest exists within a local governmental unit's boundaries. If the unit can be placed within a single district and closely approaches the ideal district population, it is indeed likely that the representative of the resulting district will be highly responsive to the political wishes of the unit. If the unit is divided into two districts, the legislators representing the districts will also be responsive, but perhaps less raptly so. Is the unit more influential when its political interests are intensely pursued by a single legislator, or when pursued somewhat less single-mindedly by two? "[W]hether a city or county is made worse or better off by being divided depends upon the trade-off between a potentially lower level of legislative responsiveness and the benefit of having additional channels of representation." B. Cain, *The Repportionment Puzzle* 62 (1984). The desirablity of such a trade-off is a political question.

The desire to maximize the influence of local governmental units is, moreover, relevant principally when a proposed piece of legislation affecting the unit is controversial. Necessarily, then, there will be some group or groups that

[33] The basic assumption that the residents of a political subdivision will have a collective common interest is dubious. Deep, divisive intra-city and intra-county conflicts are a well-known fact of political life. Indeed, city and county governments elected at large have been criticized for submerging these conflicts.

oppose the legislation and who have interests adverse to those of the governmental unit. Thus, concentrating the unit's voting strength in a single district may well favor one political group over another.

Formal criteria fail as techniques for adjudicating the competing claims of partisan political groups. The vagueness of the concepts and the conflicts between them assure that decisions based on them will lack any coherence or consistency, thus opening the federal courts to charges of judicial gerrymandering. And, vague or not, all criteria embody political judgments of their own — judgments of a nature that are undoubtedly best left to our pluralist political process. The question remains, then, whether the reformers' "result-oriented" tests hold out any hope for plotting a judicial path through the political thicket.

B. "Result-Oriented" Criteria Also Fail As Neutral Judicial Criteria for Identifying and Remedying Partisan Gerrymandering.

The preceding section discussed several formal criteria that reformers and political scientists have proposed as redistricting values that should be constitutionalized or used as indicia of unconstitutionality. But another school of reformers and political scientists eschews these formal criteria, finding them to be essentially naive. The perceived problem with these criteria is their emphasis on the characteristics of individual districts, rather than with how a set of districts translates the individual votes cast in the districts into a set of representatives. In this respect, these political scientists would argue, the focus of formal criteria is all wrong. The purpose of legislative districting, after all, is to elect members of a legislative body. To them, the

character of individual political districts is far less significant than the political composition of the resulting legislature.[34]

But result-oriented criteria have problems of their own. Some proposed criteria are instrumental; they require districting that will make the representative system function in a manner deemed desirable by the proponents. The difficulty is that, although the goals established may be plausible, there are usually equally plausible reasons for seeking the opposite goals. Disputes over such goals are undeniably important; the question remains, however, whether they should be resolved politically or by the courts. Other result-oriented criteria do not seek to serve any instrumental purposes other than assuring a system in which the election results "properly" reflect the votes cast. Again, however, many different theories exist about the proper relationship of districts to the representatives they elect, none of them enjoying any distinctive constitutional supremacy. Moreover, such goals are fundamentally inconsistent with our system of geographically based winner-take-all districts and, as many of the proponents of such criteria themselves have recognized, lead ineluctably to the conclusion that the United States should abandon its present system of representation in favor of a system with proportional representation like that used in some Continental democracies.

This section will deal primarily with the ideal of "proportionality", an ideal that underlies, explicitly or tacitly, every proposal for laying political redistricting disputes at the judicial threshold. However, before treating the problems of proportionality, this section will first assess another result-oriented criterion on which the district court

[34] The leaders of the result-oriented school include Professors Grofman, Niemi and Scarrow. Some of their principal publications are listed in the bibliography to *Redistricting Issues, supra* n.1.

relied: "competitiveness". While competitiveness is not so ambitious a goal as proportionality, it nonetheless reflects important political judgments and is not susceptible of coherent judicial management.[35]

1. Competitiveness.

Many reformers have proposed that districts should be drawn so as to engender hard-fought inter-party contests. The absence of such competitive districts is sometimes said to be a sign that gerrymandering is afoot.[36] Whatever the merits of the proposal as a matter of politics, it fails as a manageable judicial standard for resolving partisan redistricting conflicts.

One of the principal difficulties with constitutionalizing competitiveness can be seen by examining a hypothetical state in which the "normal" vote division between the two parties is approximately even. In such a state, it should be possible, assuming one is not bound by formal criteria other than population equality, to create a plan consisting entirely of highly competitive districts. Suppose further that in the first year of the plan, there is a modest but clear Democratic trend throughout the state. Since by hypothesis all the districts are designed to split evenly in a "normal" year, the result is likely to be that Democratic candidates win by small margins in the overwhelming majority of districts. Suppose that in the next election, there is a Republican trend of about the same strength. The legislature is likely to swing from being overwhelmingly Democratic to overwhelmingly Republican. Most political commentators have regarded it as a strength of our

[35] For a more detailed discussion of the infirmities of these and other result-oriented criteria, *see* Lowenstein & Steinberg, *supra* n.2.

[36] The district court apparently concluded that the Indiana districting plan contained inadequately competitive districts, Appx. to Juris. Stat. at A-12, though the court's discussion of the topic is cursory at best.

system, however, that we avoid such violent fluctuations and that the minority party is generally assured a substantial presence in the legislature in all states in which there is a genuine two-party system. *See, e.g.,* B. Cain, *The Reapportionment Puzzle* 50 (1984). From this perspective, a districting plan that maximized competitiveness would be seriously contrary to the public interest.

Commentators have recognized other reasons for not constitutionalizing the competitiveness criterion. Competitiveness does not come without cost. In one sense this statement can be taken literally; the more competitive the district, the more need the candidates will feel to spend, and therefore to raise, enormous amounts of campaign money, with all the attendant problems. *Id.* at 68; *see* Jacobson, *Money in Congressional Elections* (1980). Another cost may be in the quality of representation. Although we generally want legislators to be responsive to public opinion, a legislator in an insecure district may be tempted to carry this virtue to excess. The result may be an unwillingness to take principled or far-seeing stands, excessively parochial concern with the district to the detriment of the state or nation as a whole, and preoccupation with raising "special interest" money at the expense of attention to legislative duties. Moreover, a state concerned with effective representation may have a significant and legitimate interest in maintaining at least some incumbents in office, especially those who have achieved a measure of power or influence in the legislative body to which they are sent. *See* B. Cain, *The Reapportionment Puzzle,* 12-15.

If the presence of "some" competitive districts were elevated into a constitutional criterion for the validity of a plan, the first question that would arise would be "how many?" There is no obvious constitutional answer to this question. Answering it will be greatly complicated by the extreme difficulty of counting the competitive districts in

an actual districting plan. The competitiveness of a district depends on many factors, many of which cannot be known with certainty when the plan is adopted. The percentage of registered voters in each party and the voting history of the district are undoubtedly important factors, but they do not by themselves indicate which districts will be competitive. A factor of great importance is the incumbent, who usually has significant advantages and is likely to run well ahead of what would be predicted for his party if registration and voter history alone were considered. But the incumbent may be much stronger in some areas than others. The strength of the challenger is also an important factor, but may not be known when the plan is adopted. An exceptionally skillful or inept campaign on one side or the other, or other events such as an unexpected scandal or a new issue may render a competitive district safe or vice-versa. Until these unknowns are known, which is necessarily after the plan is drawn, it is meaningless to talk of most districts as either safe or competitive.[37] *See* B. Cain, *The Reapportionment Puzzle* 67-68 (1984). Thus, the assessment of the degree of competitiveness of a redistricting plan is at most an art, rather than a science, and the application of the art to resolve partisan redistricting conflicts involves inescapably political judgments.

2. Proportionality.

It was observed earlier that proposals to have the judiciary police partisan vote "dilution" depends on the existence of an at least implicit standard from which to measure dilution. For the court below, as well as for many commentators, that standard is proportionality. In one of his last papers, Professor Dixon opined that for parties to win

[37] The district court was either unaware of or undeterred by these difficulties. It concluded that a race in which the results are in the "45-55" percentage range is competitive. Appx. to Juris. Stat. at A-12.

seats "roughly proportional to their share of the popular vote . . . is the very core of the term fair representation." Dixon, *supra* n.1 at 9. But as many writers have observed, the winner-take-all district system of elections, unlike the proportional representation systems in use in some foreign democracies,[38] by its very nature looks to a number of separate contests and is thus fundamentally opposed to any concept of adding up national or statewide vote totals. "[T]o compare the results of elections under our system with a proportional ideal is simply 'to superimpose one system of representation upon the structure of another.' " Engstrom, *supra* n.4, at 215-16. Thus, there is a fundamental tension between our present political structure and the very core of the representational reform many commentators seek. Increasingly, commentators have come to recognize this tension, recognizing that it is not gerrymandering, but our very system of representations that is in conflict with the proportionality ideal. Professor Dixon admitted that:

> A paradox of the one-man, one-vote revolution is that we now perceive our goal to be something approaching a proportional result, in terms of group access to the legislative process. But the district method itself, when combined with straight plurality election, is the source of many problems.[39]

Elsewhere, he concluded that proportional representation "may be the only way of making good on one-man, one-vote, if that is interpreted: one-man, one-vote, each vote to

[38] Justice Douglas' dissent in *Wells v. Rockefeller*, 376 U.S. 52, 59-67 (1964), contains an intriguing discussion of the Lebanese and Indian experiences with proportional representation.

[39] Dixon, *The Court, the People, and "One Man, One Vote"*, in *Reapportionment in the 1970's* 13 (N. Polsby ed. 1971).

be as *effective* as possible."[40] Other commentators have reached the same conclusion. Professor Pennock has called proportional representation "the logical extension of the one-person, one-vote ideal." J. Pennock, *Democratic Political Theory* 358 (1979); *see also* Note, *The Constitutional Imperative of Proportional Representation,* 94 Yale L.J. 163 (1984).

If this is so, then the reformers' view of the one-person, one-vote ideal will require a revolution in the system of representation in the United States. The Constitution of course contains no charter for a judicial implementation of the revolution. Proportionality, however desirable as a political goal, is inconsistent with our present system, and cannot even begin to lay claim to being a manageable judicial standard for resolving partisan redistricting disputes.

It is commonly supposed that in the absence of gerrymandering, it is natural and in the long run even inevitable that the seats/votes relationship will be proportional. *See, e.g.,* testimony of David Wells and David Cohen at U.S. Senate hearings, quoted and described in Grofman, *For Single-member Districts Random is Not Equal,* in *Redistricting Issues, supra* n.1 at 55. Accordingly, the fact that a particular plan produces disproportionate results is commonly pointed to as compelling evidence of gerrymandering. The appeal of the proportionality test is no doubt explained by this notion of its naturalness as well as by its simplicity.

Notwithstanding its popularity, the proportionality criterion has been rejected as unrealistic virtually without exception by every scholar who has seriously considered the

[40] Dixon, *supra* n.3 at 525. It appears that Professor Dixon ultimately settled on the bi-partisan commisison as the vehicle for redistricting reform. *See* Dixon, *supra* n.l.

question. *E.g.,* Backstrom, *et al., supra* n.5 at 1134; Baker, *supra* n.3 at 21; Dixon, *supra* n.1 at 9; Engstrom, *supra* n.4 at 175 n.8; Grofman, *For Single-Member Districts Random Is Not Equal,* in *Redistricting Issues, supra* n.1 at 55; Tufte, *supra* n.13. The reason is that far from being natural, a proportional outcome in a system of single-member, winner-take-all districts can be expected to occur only when supporters of each party are segregated into separate districts to a far greater degree than is likely, given American political geography. Under conditions of anything like normal dispersion of party support, a party that wins a majority of the votes will win a disproportionately large percentage of the seats.[41]

The underlying demographic reality is that, whatever may be a given group's statewide concentration, only its relative concentration within the local district area determines whether it will be able to carry the district. If a minority group is randomly distributed, the likelihood that it will have a local majority concentration, and hence the likelihood that it will carry any district, falls rapidly. Groups whose statewide strength is twenty percent or less may well carry no seats at all. In a perfectly even distribution, a minority group gets zero seats. Thus, the principal underpinning of the proportionality criterion — its supposed naturalness — turns out to be a chimera.

This uselessness of the proportionality standard as a measure of gerrymandering is borne out in practice. The Congressional districts used in Illinois and Minnesota for the 1984 elections were court-approved plans, presumably free of any attempt to "dish" partisan groups. *In re Illinois Congressional Districts Reapportionment Cases,* No. 81 C 3915 (N.D. Ill. Nov. 23, 1981), *aff'd mem.,* 454 U.S. 1130

[41] The leading study in this area is Kendall & Stewart, *The Law of the Cubic Proportion in Election Results,* 1 Brit. J. Soc. 183 (1950).

(1982); *LaComb v. Growe,* 541 F.Supp. 145 (D. Minn.), *appeal dismissed sub nom. Orwoll v. LaComb,* 456 U.S. 966 (1982). Nonetheless, the election results were distinctly disproportional. In Illinois, Democrats won 51.7% of the statewide vote, but 59.1% of the seats. Minnesota Republicans won 50.1% of the statewide votes, but only 37.5% of the available seats.[42] Similarly, in 1967 then-Governor Ronald Reagan signed[43] a California Congressional redistricting plan that in 1968 gave Republicans only a 44.7% minority of the Congressional seats for a 55.2% majority of the cumulative vote.[44] Was Ronald Reagan a Democratic gerrymanderer?

A proportionality test conflicts not only with our present district-based system, but also with the fact that districts must be based on equal numbers of persons, not voters. *See Burns v. Richardson,* 384 U.S. 73 (1966).[45] Voter turnout is independent of district population. The smaller the voter turnout in a district, of course, the fewer votes needed to win.[46] If one political party consistently has more strength than another in areas with low voter turnout, it will be able to secure more seats with fewer votes. This, however, is a far cry from proof of gerrymandering. As Professor Cain

[42] The statistics are taken from the *Congressional Quarterly,* April 13, 1985 at 691, 692.

[43] Governor Reagan did not hesitate to veto redistricting legislation he found unfair. *See Legislature v. Reinecke,* 6 Cal. 3d 595, 602 (1972).

[44] These statistics are compiled from Secretary of State, *Statement of the Vote, State of California General Election November 5, 1968* 15-18.

[45] Proportionality enthusiasts almost invariably insist on proportionality between seats and votes, but other measures of proportionality could also serve. In *Gaffney v. Cummings,* Connecticut had attempted to create proportionality to estimates of general statewide political strength. Proportionality to recent voter registration could also be used.

[46] It should also be remembered that, as in this case, there are often races in which candidates run unopposed. Such races obviously skew any seats/votes analysis.

has observed: "There is no reason to expect that a standard of political fairness based on the ratio of seats to votes will correspond well with redistricting by population." B. Cain, *The Reapportionment Puzzle* 75 (1984).

Nor are these considerations without important political ramifications. Voter turnout in a district depends on, among other things, the number of persons below voting age, the number of resident aliens, and the number of persons who simply do not vote. These factors, in turn, are affected by social, economic and cultural factors. The ratio of voters to total population is lowest in low-income areas and areas with high concentrations of racial and ethnic minorities. *Id.* at 75-76. This Court has noted that in some states, Congressional districts vary by as much as 29% in age-eligible voters. *Gaffney v. Cummings,* 412 U.S. 735, 747 (1973). And, as the Court noted in *Burns,* the principle of districting by population rather than number of voters is an important protection for relatively weak groups that have often been the victims of past discrimination. *Burns, supra,* 412 U.S. at 92-93. Such groups are unlikely to see proportionality as a fair or neutral standard.

Quite apart from its serious analytic flaws and its predictable political results, a proportionality standard is simply incapable of practicable administration, judicially or otherwise. The basic problems are twofold. First, proportionality enthusiasts always posit only two political parties; hypothetical redistricting schemes designed to achieve proportionality between two parties are relatively simple to construct, at least in the context of academic writings. But if every "identifiable" political group is entitled to judicial protection in the redistricting process, then proportionality will be impossible to achieve, since memberships in these groups will often overlap. Achieving proportionality for a minority racial group, for instance, may well conflict with proportional representation for a religious group. *See*

United Jewish Organizations, Inc. v. Carey, 430 U.S. 144 (1977). The religious group, in turn, is likely to comprise both Republicans and Democrats, as well as opponents and proponents of other political interests, all of whom will insist on electing representatives in numbers proportional to their voting strengths. The prospect of resolving these competing claims in a federal courtroom is a singularly unappealing prospect.

Second, the proportionality of a redistricting plan cannot be known until an election has been held under it, at which time it will be possible to tally votes and seats won. Thus, in order to apply a proportionality test to a set of districts challenged before they have been used in an election, the courts would have to engage in political prognostication — a notoriously treacherous enterprise. *See, e.g., Kilgarlin v. Martin,* 252 F. Supp. 404, 433 (S.D. Tex. 1966) ("only demonstrable way available to fathom the political inclinations of a certain area at any given time is at the ballot box on a given election day"), *aff'd in part sub nom. Kilgarlin v. Hill,* 386 U.S. 120 (1967).

Proportionality has an undeniable appeal, yet is inconsistent with the very nature of our system of representation. This inconsistency and the consequences that flow from it render proportionality useless as a standard for evaluating claims of partisan gerrymandering. This tension, of course, is no reason to reject exploration of the idea, which has recently been the subject of interesting commentary. That exploration, however, clearly belongs in the political realm and not in the realm of constitutional mandate.

III.

CONCLUSION

It has not been the intent of this brief to deny that the redistricting process often provides an unedifying view of

raw partisanship at play in our legislatures, or to argue that all reforms are unworthy of consideration. Any political system as vital as our own must be open to criticism and reform, however much it may disturb the status quo. The question, however, is which institutions are best suited to such tasks. Partisanship and tough politics manifest themselves in many forms; proposals to counter these manifestations abound, yet only the most committed activist would suggest that it is the federal judiciary that should bear the burden and uncertainties of reform.

Redistricting reform is no stranger to the political process. From time to time, Congress has seen fit to impose statutory compactness and contiguity requirements on the state legislatures that draw Congressional districts. Many states, by statute, constitutional amendment or by popular initiative have attempted to tame the process by experimenting with bans against odd-shaped districts and dividing municipal units or communities of interest. These attempts have met with varying degrees of popular acclaim. Some states permit an aggrieved political party to subject a disfavored redistricting plan to a statewide referendum vote. In 1982, such a campaign, led by President Reagan and the Republican National Committee, struck down a California Congressional redistricting plan. Other states have followed Professor Dixon, and have abandoned the "neutral standards" approach entirely, trying instead to remove politics from the process by removing the process itself from the political arena to non-partisan or bi-partisan commissions. Some local jurisdictions have even experimented with proportional representation systems. The federalist system of government embodied in the Constitution of the United States invites this kind of experimentation and reform in politics.

The Constitution, however, does not contain any directive to the judiciary to harness what are seen as partisan

excesses in redistricting. It is true that this Court has intervened to secure the principle of equipopulous districts. But management of that purely arithmetic requirement is a far cry from management of the conflicting representational aspirations of the myriad political interest groups that populate those districts. As this brief has demonstrated, neutral and manageable standards for judicial application no more exist in this area than they do in any other area of conflict whose resolution has traditionally been left to our political process.

The unanimous words of this Court in *Gaffney v. Cummings* are peculiarly appropriate to the principal issue presented by this appeal. The adjudication of partisan redistricting disputes is a "vast, intractable reapportionment slough." The Court should not mire itself in that slough.

Dated: May 9, 1985.

Respectfully submitted,

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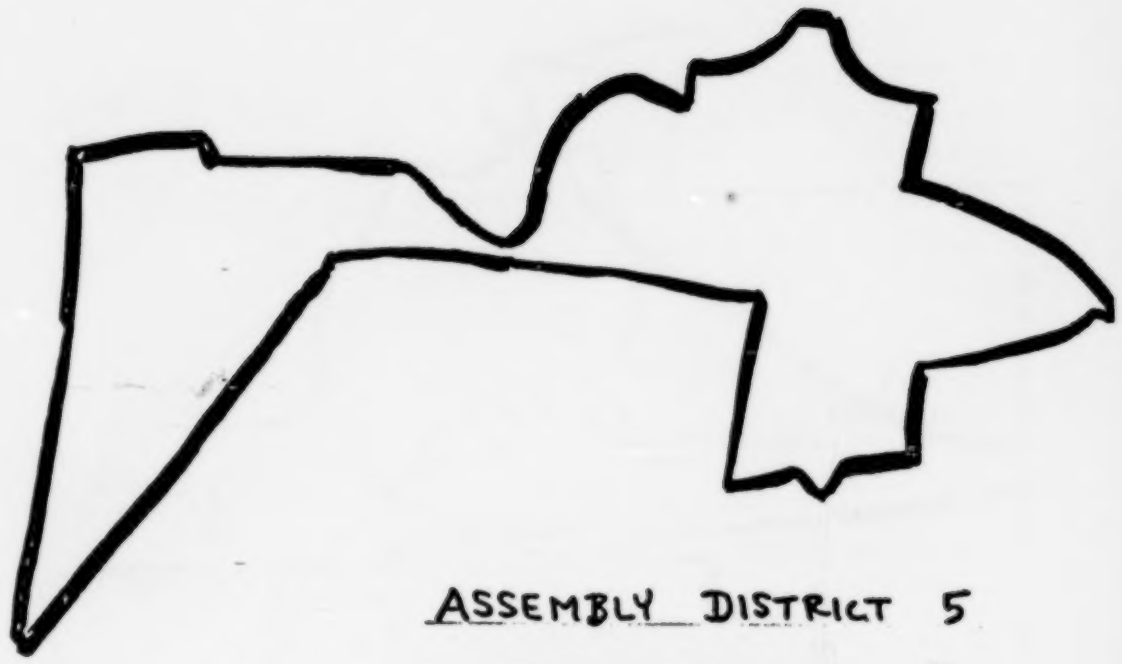


Appendix A

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

2a

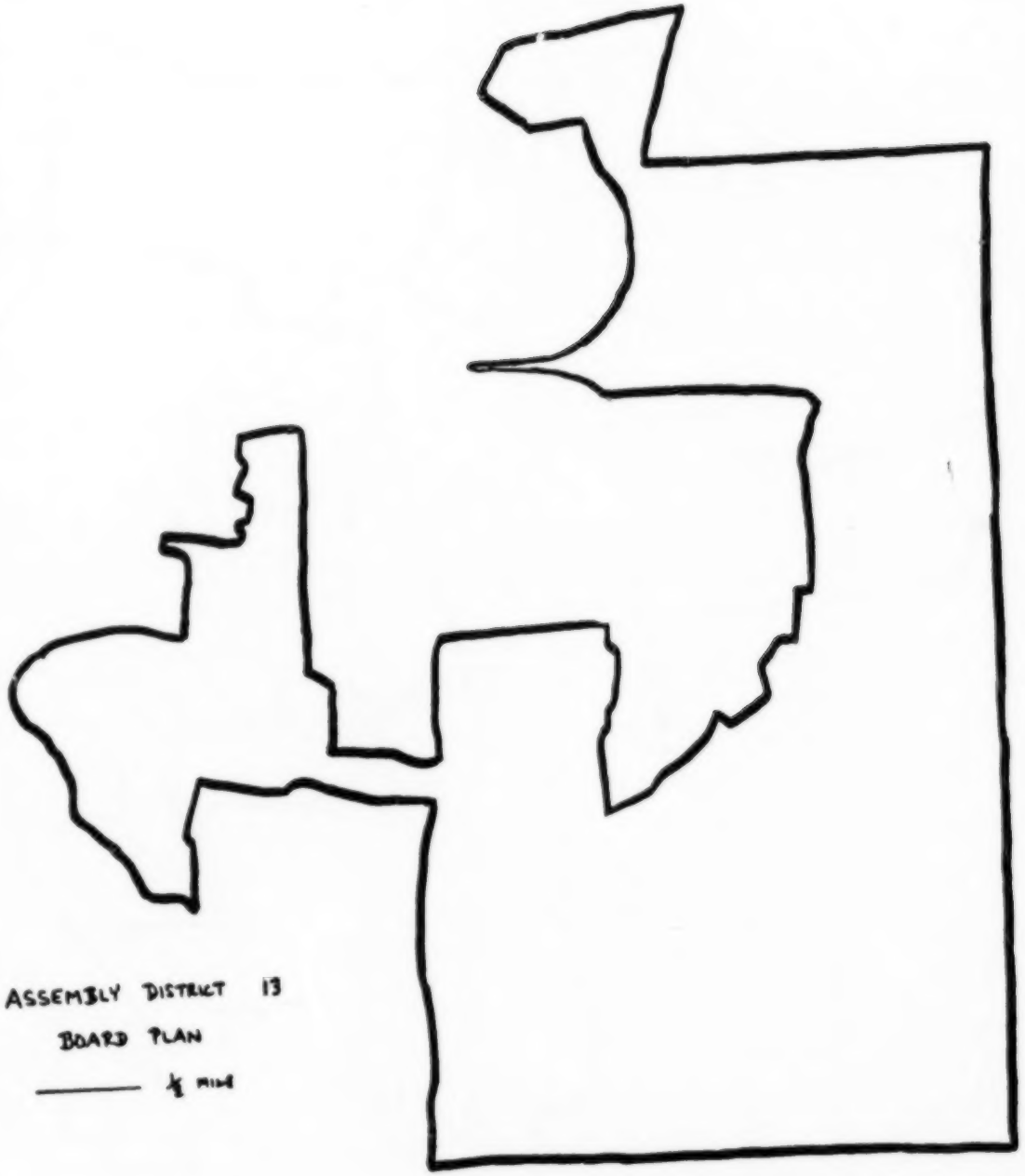
ASSEMBLY DISTRICT 12

BOARD PLAN

——— ½ MILE

H-12

3a



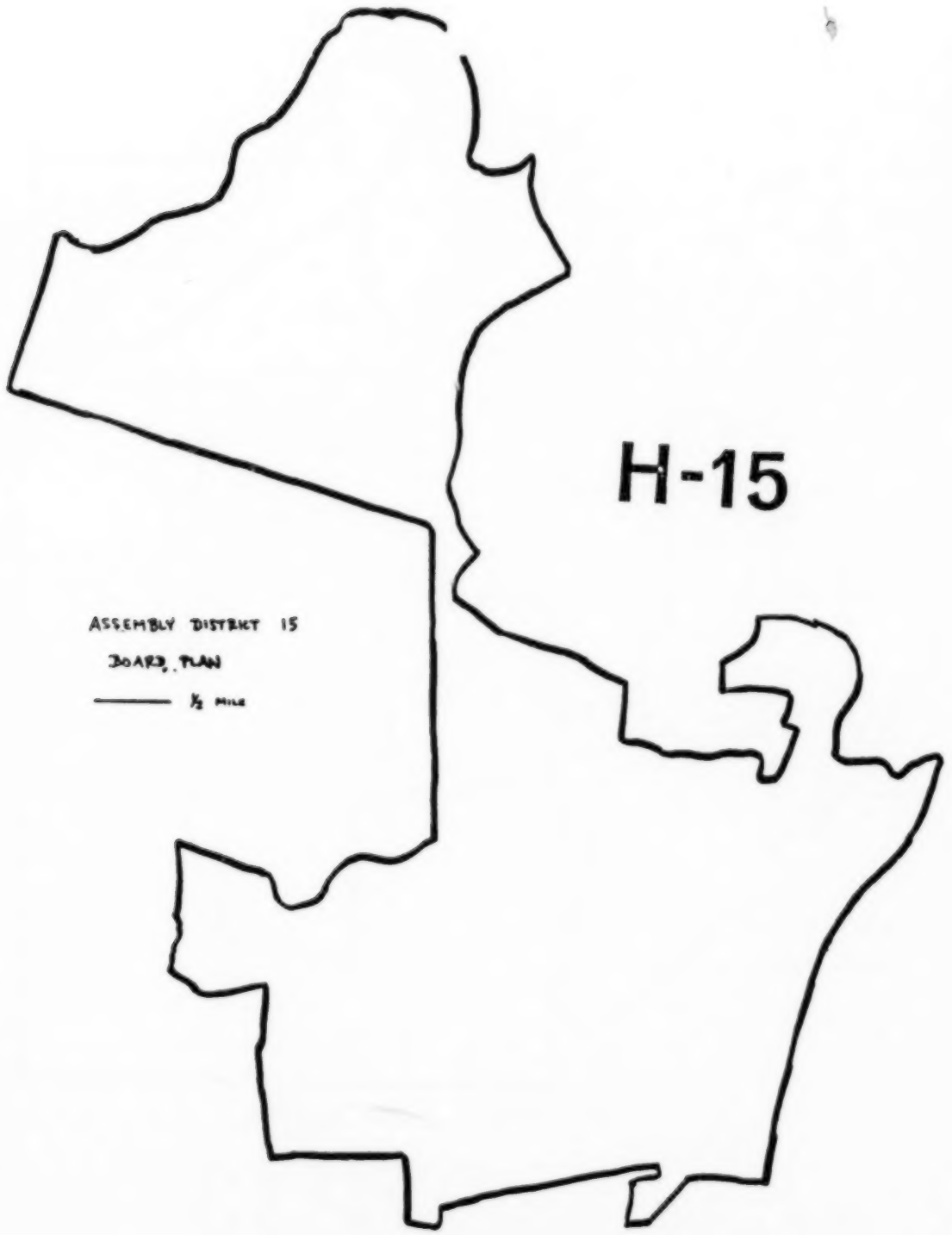
ASSEMBLY DISTRICT 13

BOARD PLAN

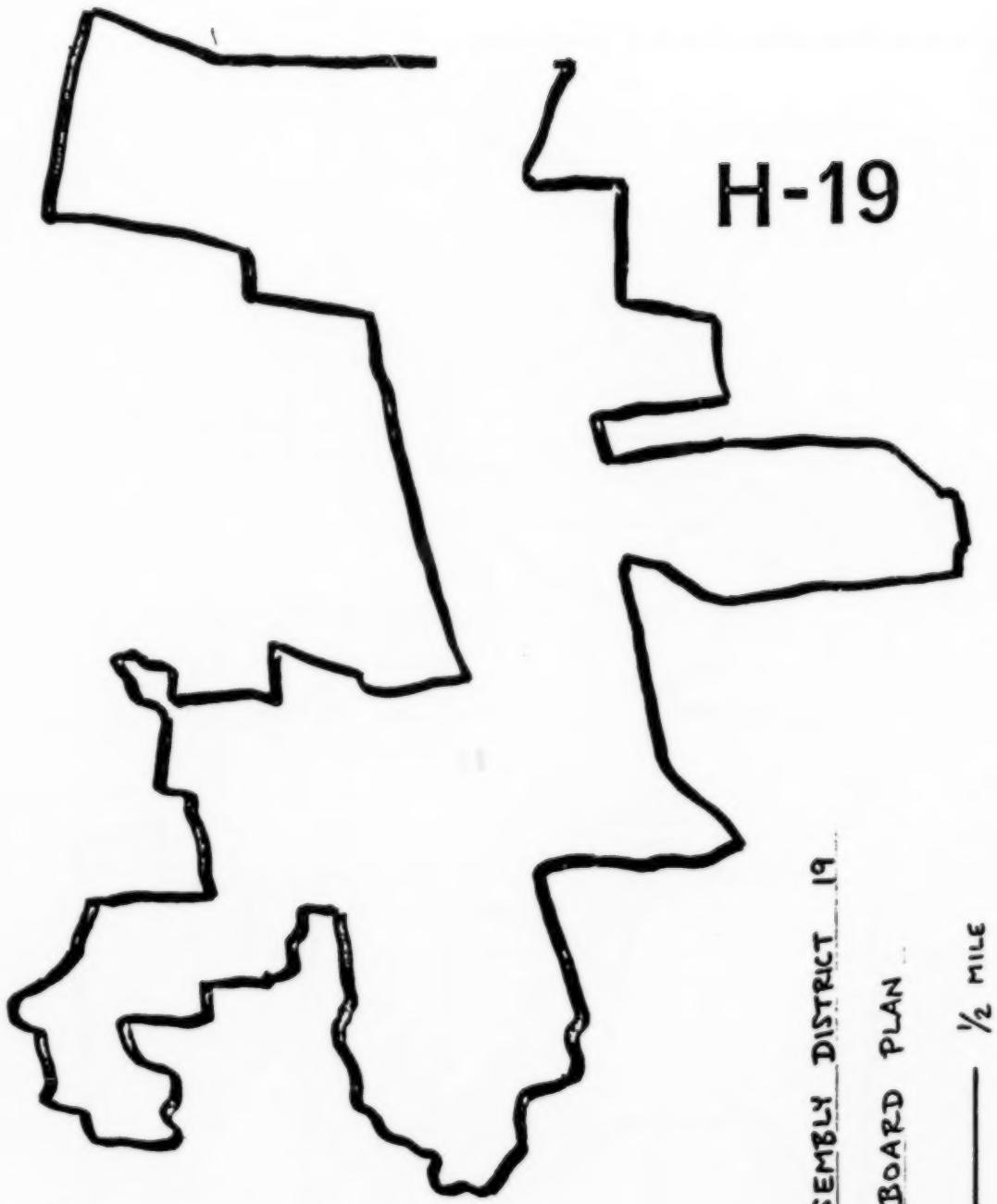
——— ¼ MILE

H-13

4a


H-15
ASSEMBLY DISTRICT 15
BOARD PLAN
½ MILE

5a


H-19
ASSEMBLY DISTRICT 19
BOARD PLAN
½ MILE

6a


ASSEMBLY DISTRICT 20
BOARD PLAN
½ MILE

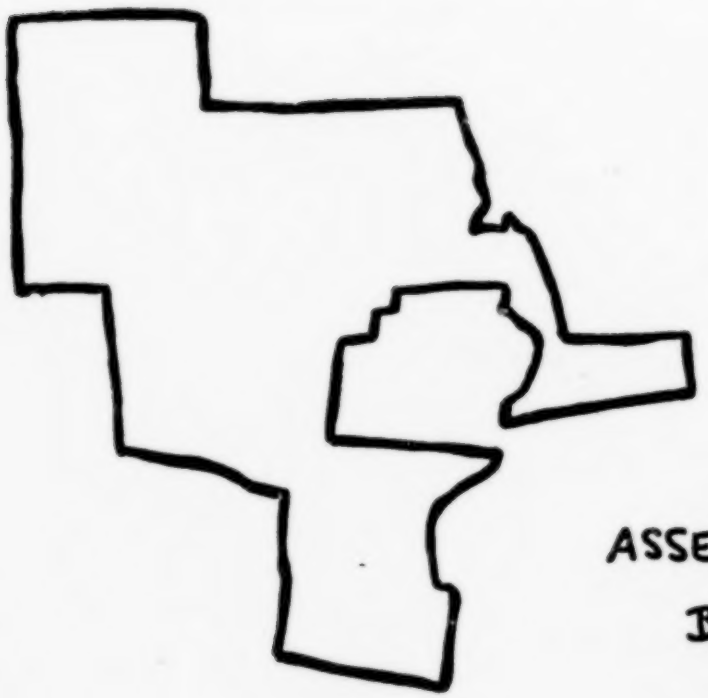
H-20

7a


ASSEMBLY DISTRICT 41
BOARD PLAN

H-41

8a



ASSEMBLY DISTRICT 5
BOARD PLAN

1/2 MILES

H-50

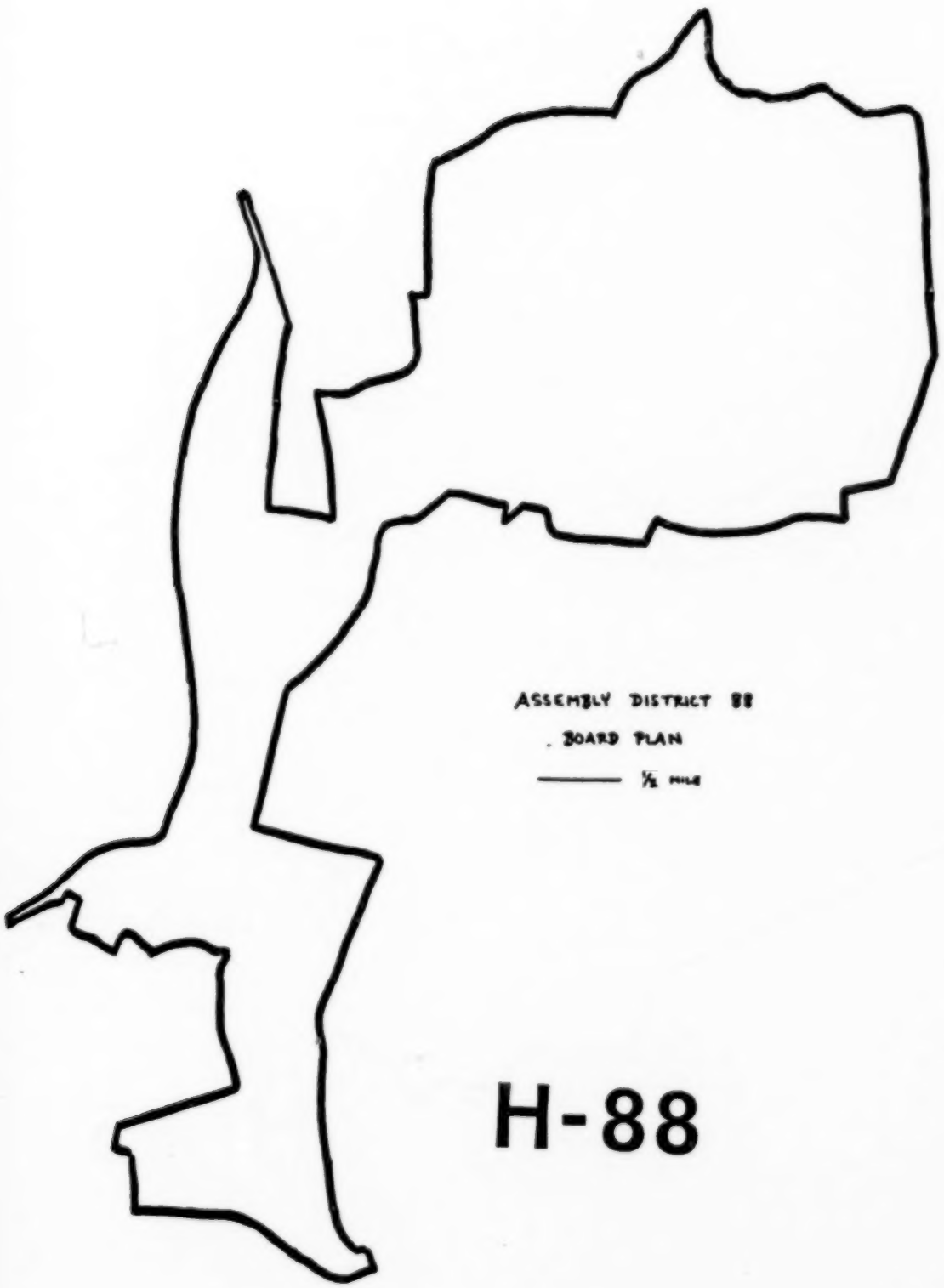
9a

ASSEMBLY DISTRICT 85
BOARD PLAN

1/2 MILE

H-85

10a



ASSEMBLY DISTRICT 88

BOARD PLAN

——— ½ MILE

H-88

11a

ASSEMBLY DISTRICT 104

BOARD PLAN

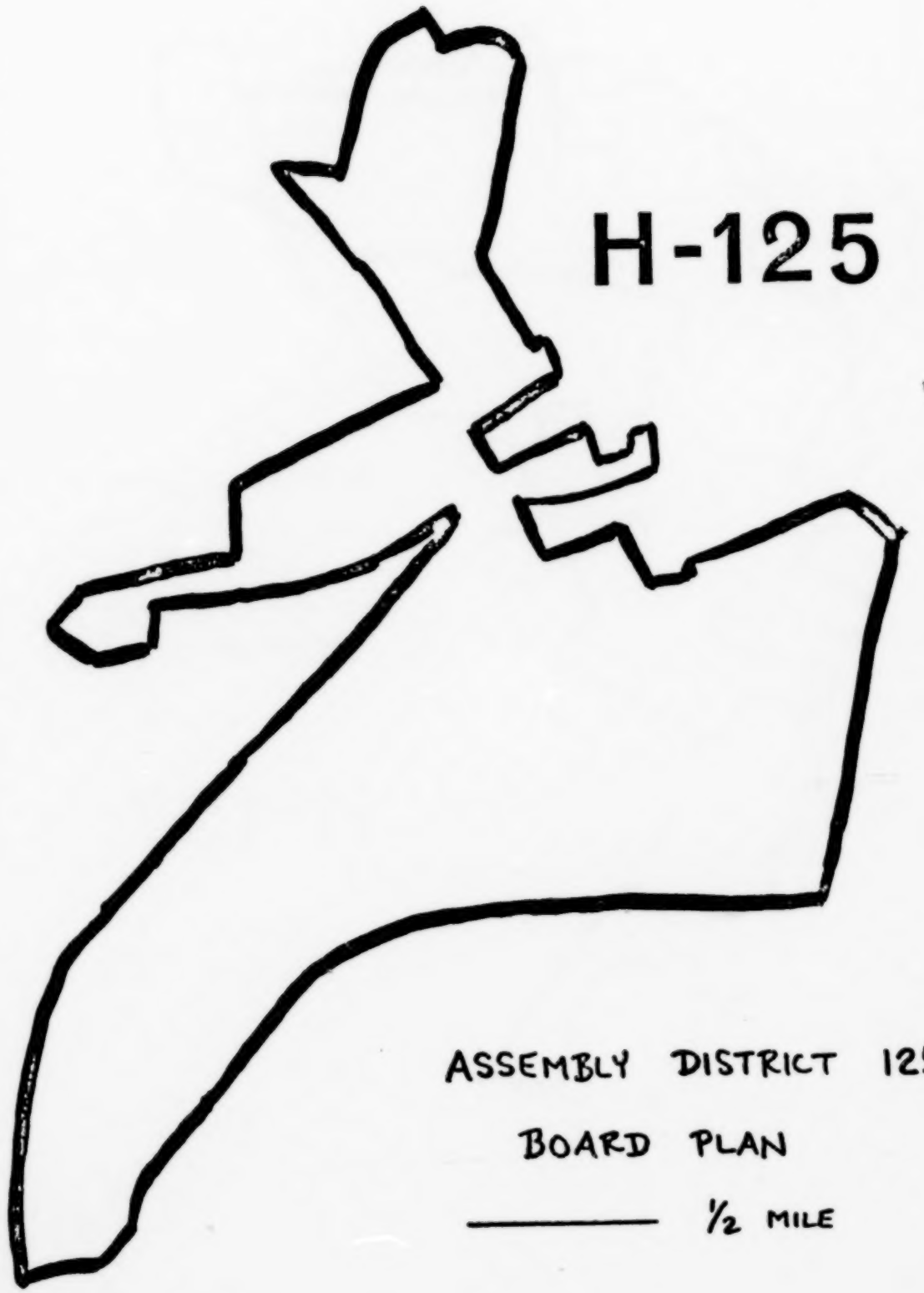
——— ½ MILE

H-104

12a

H-122

13a



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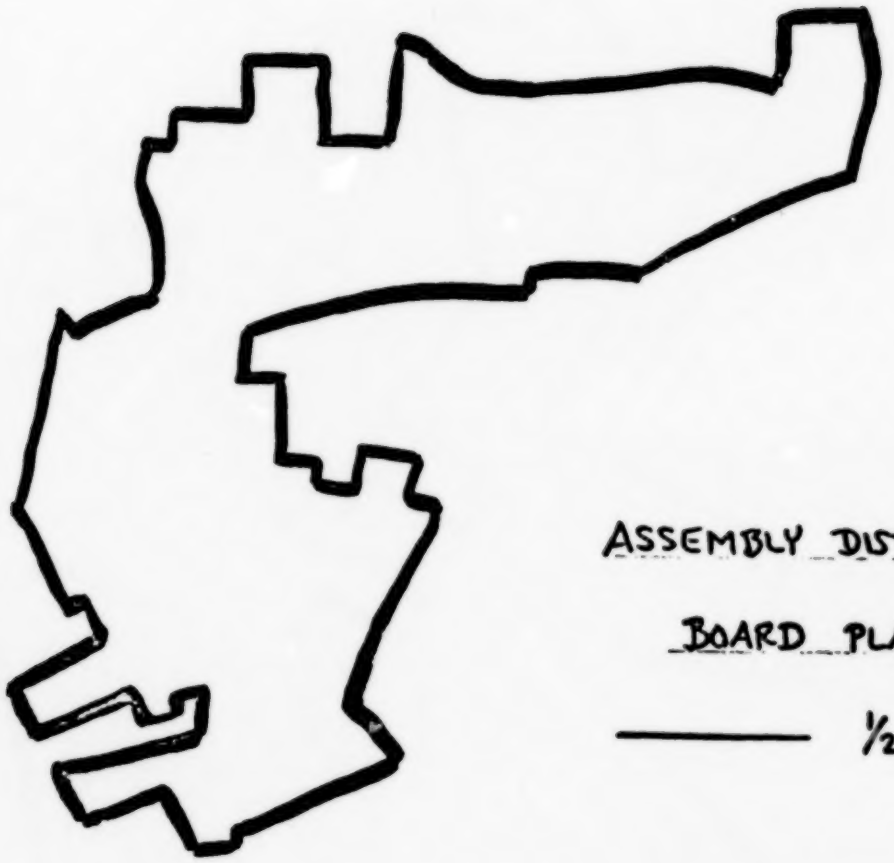


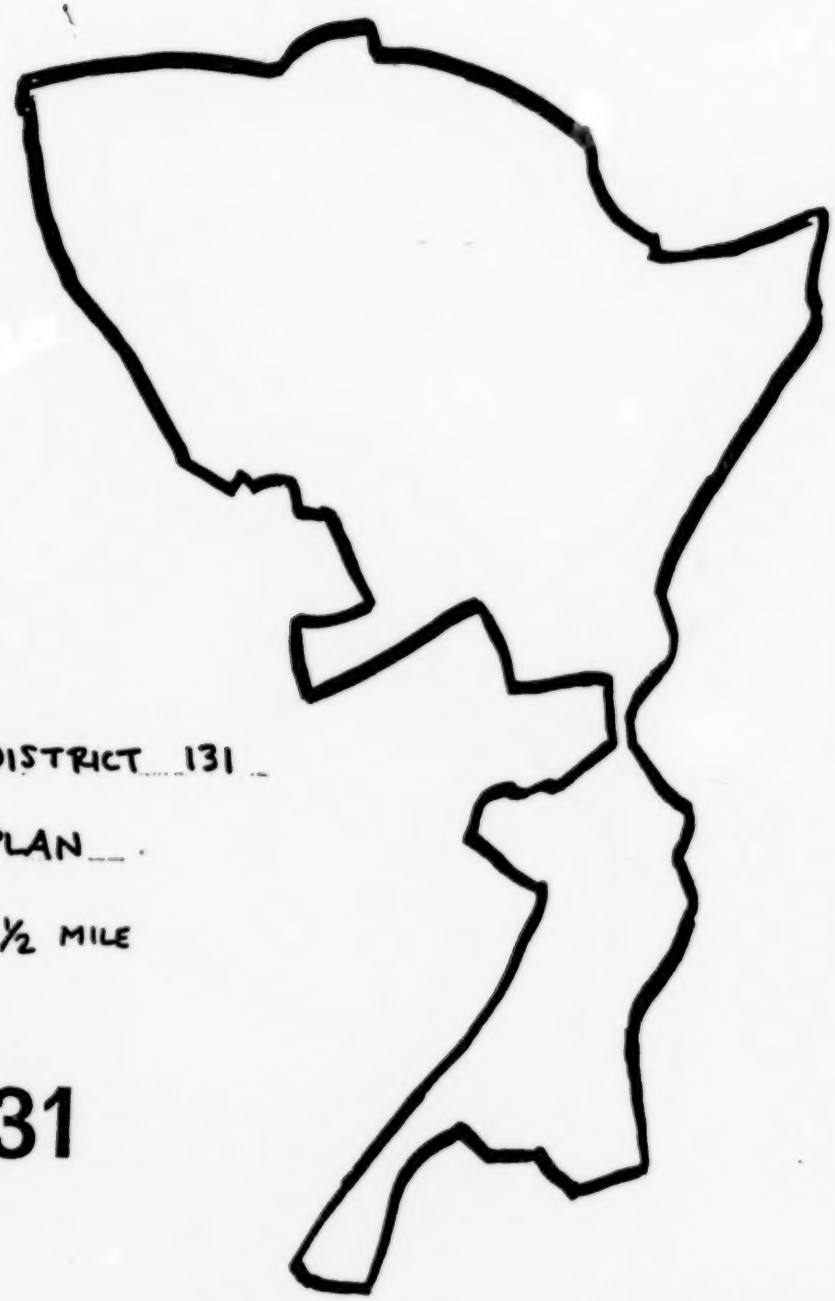
ASSEMBLY DISTRICT 127

BOARD PLAN

——— ½ MILE

H-127

15a



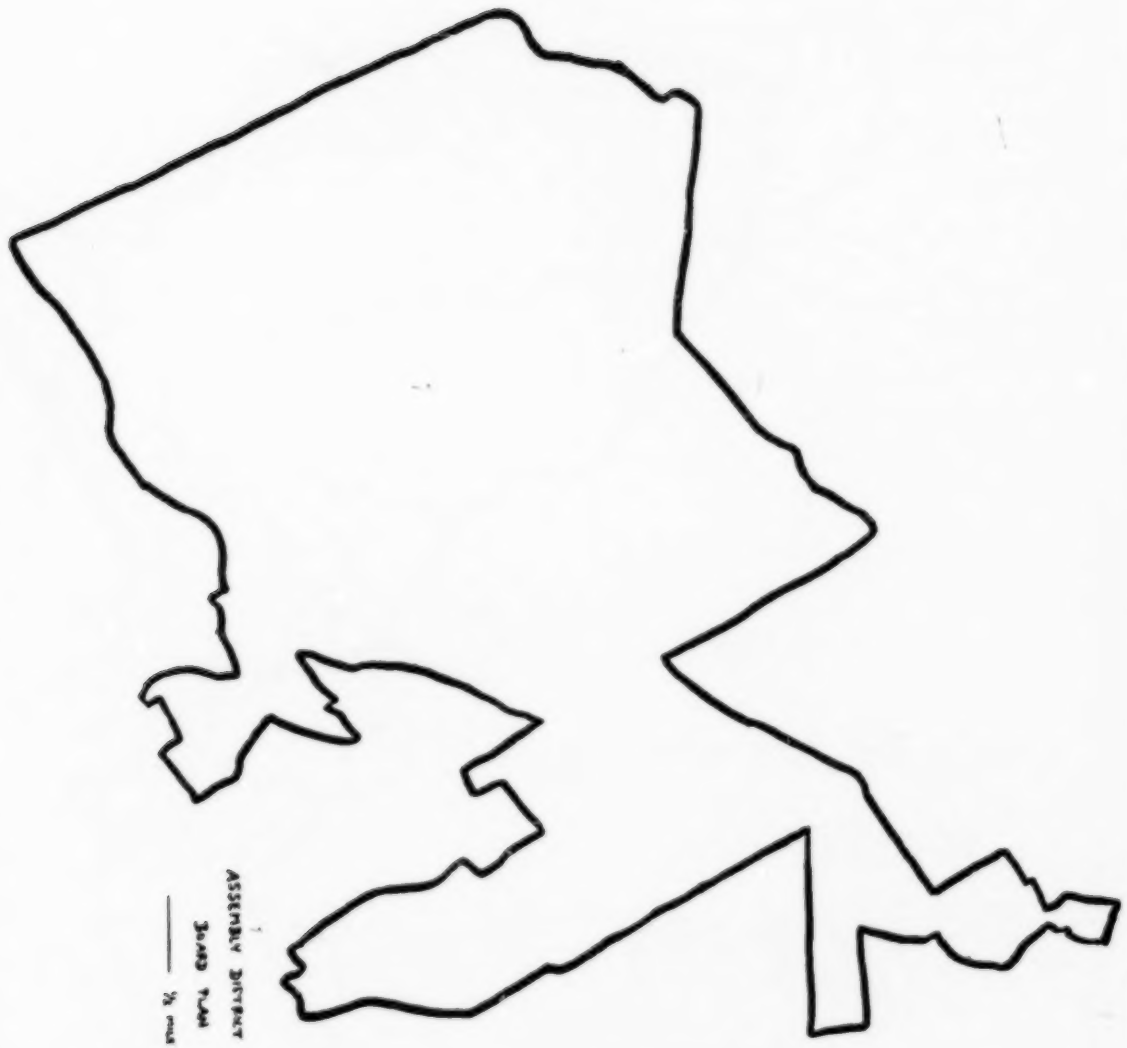
ASSEMBLY DISTRICT 131

BOARD PLAN

——— ½ MILE

H-131

16a



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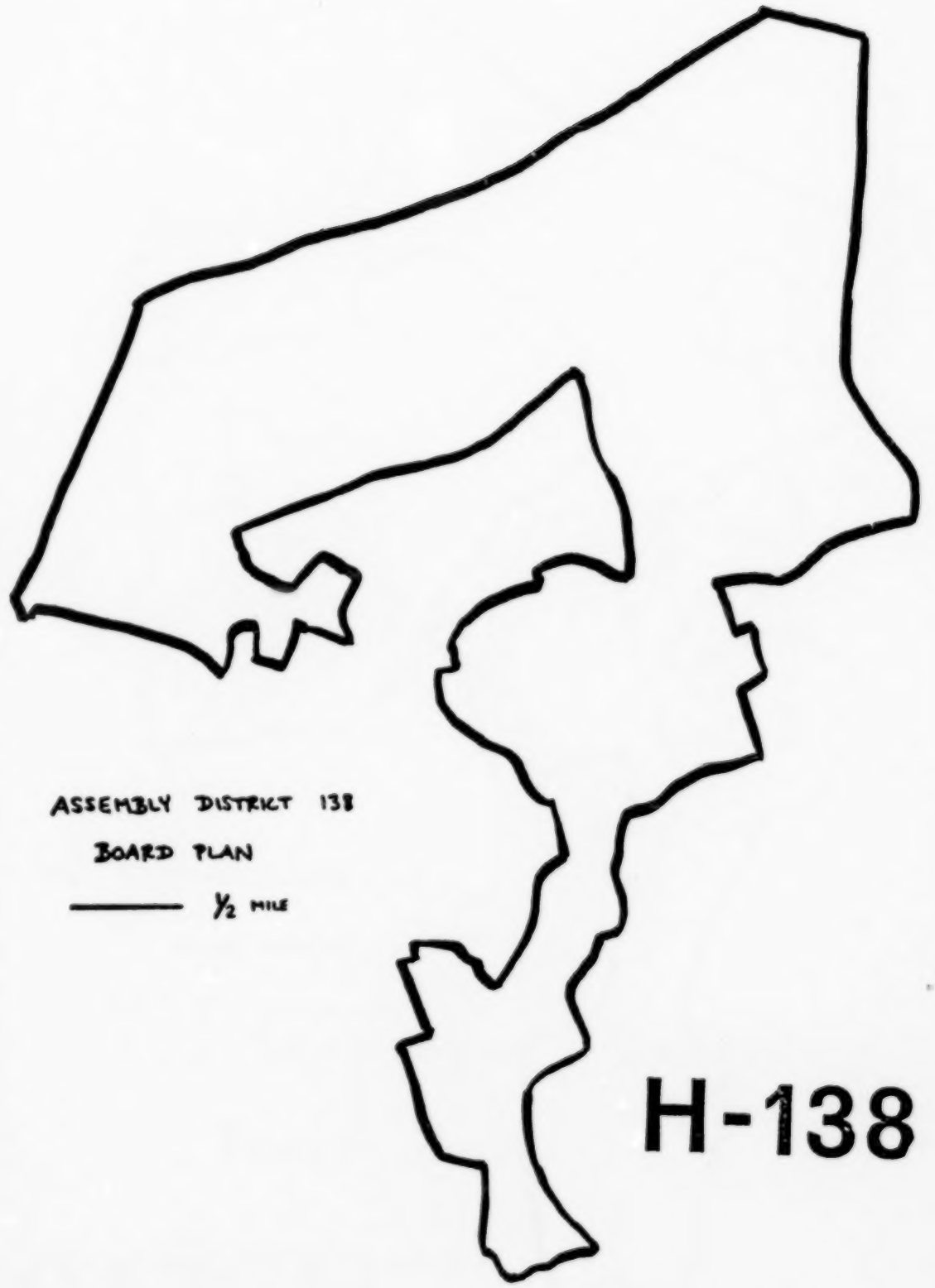


H-138

18a

ASSEMBLY DISTRICT 140

BOARD PLAN

½ MILE

H-140

19a

4th SENATORIAL DISTRICT

BOARD PLAN

1 5 MILES

S-4

20a

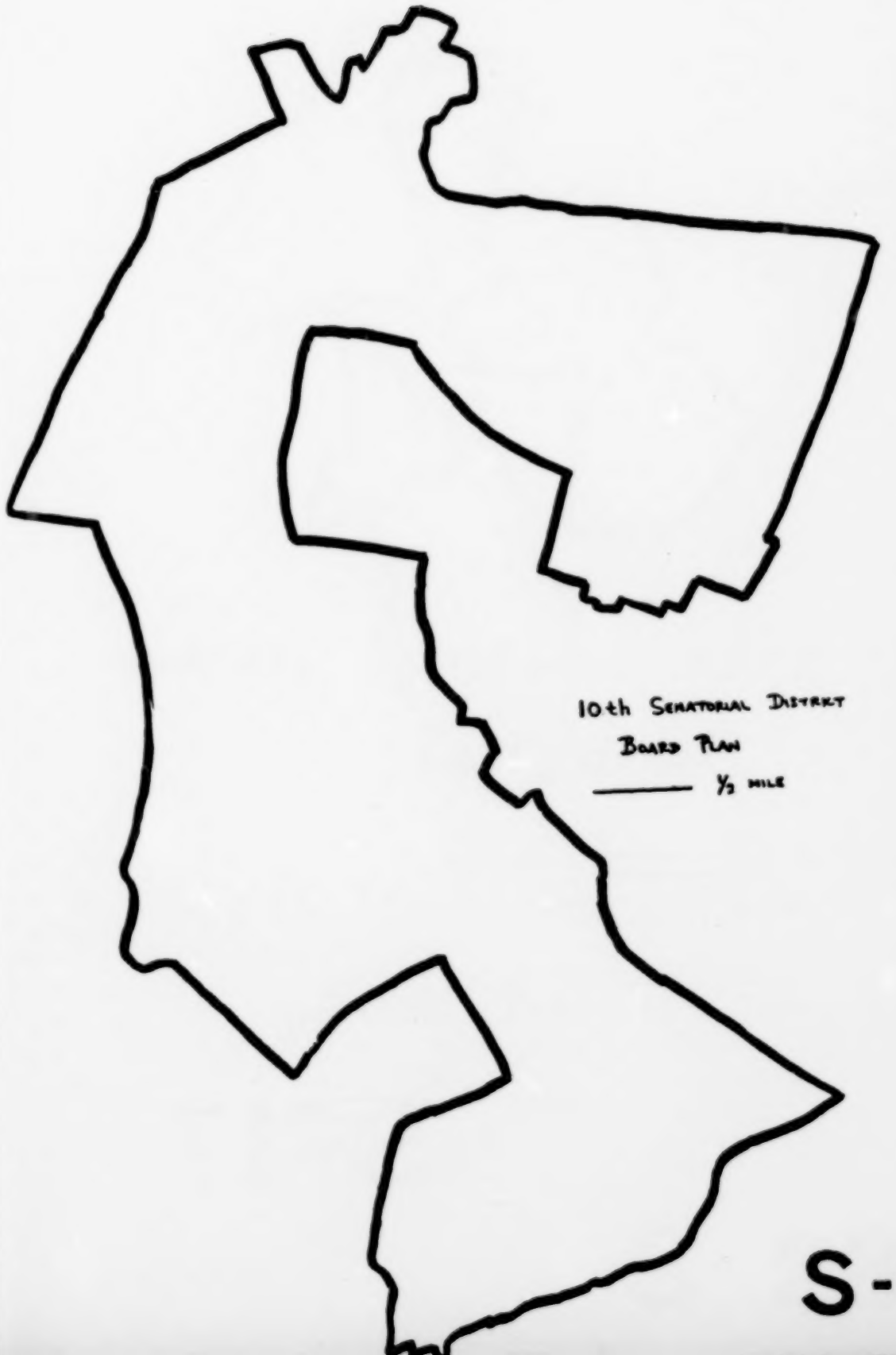
9th SENATORIAL DISTRICT

BOARD PLAN

1 5 MILES

S-9

21a



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22a

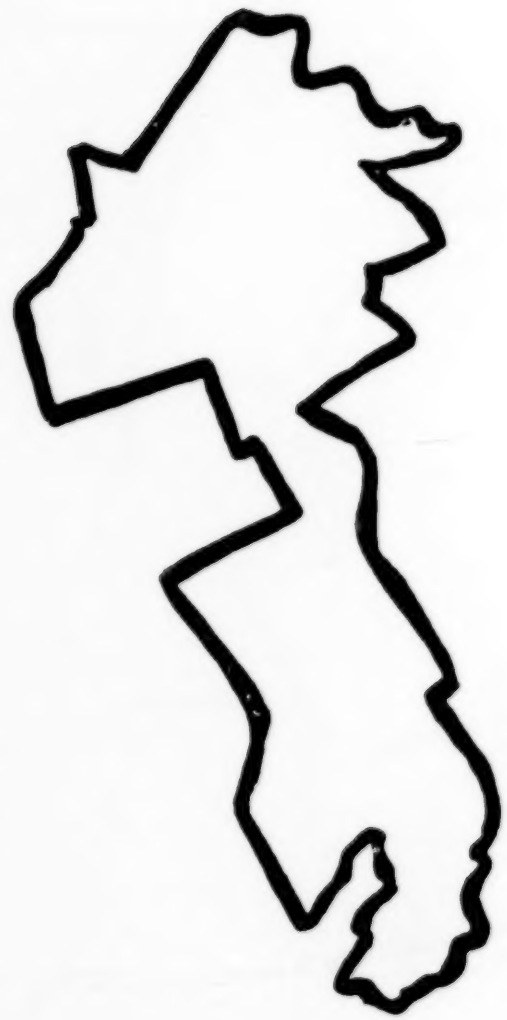
17th SENATORIAL DISTRICT

BOARD PLAN

1 5 MILES

S-17

23a



28 th SENATORIAL DISTRICT

BOARD PLAN

1 5 MILES

S-28

29th SENATORIAL DISTRICT

BOARD PLAN

1 inch = 5 MILES

S-29

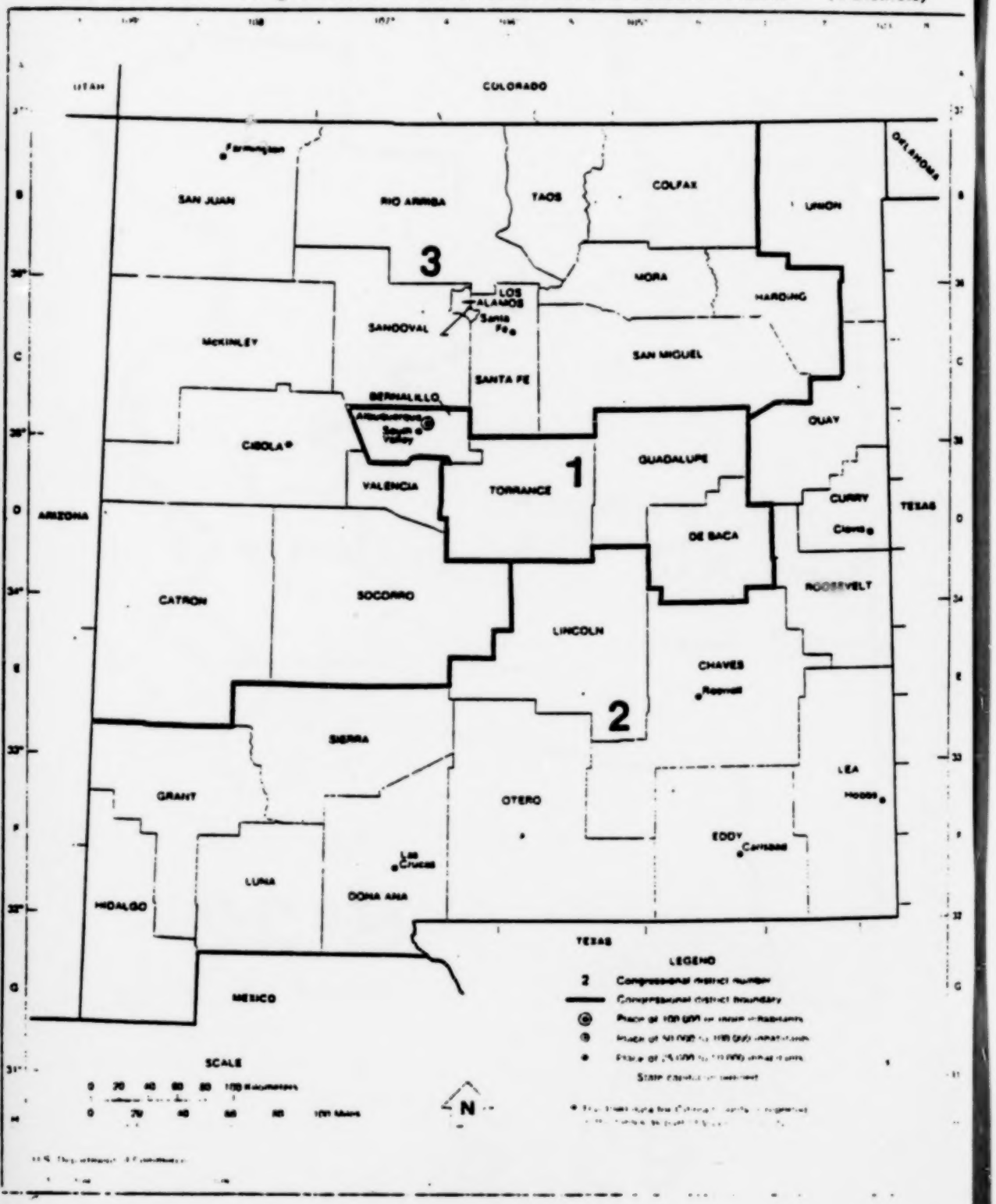
32nd SENATORIAL DISTRICT

BOARD PLAN

1 inch = 5 MILES

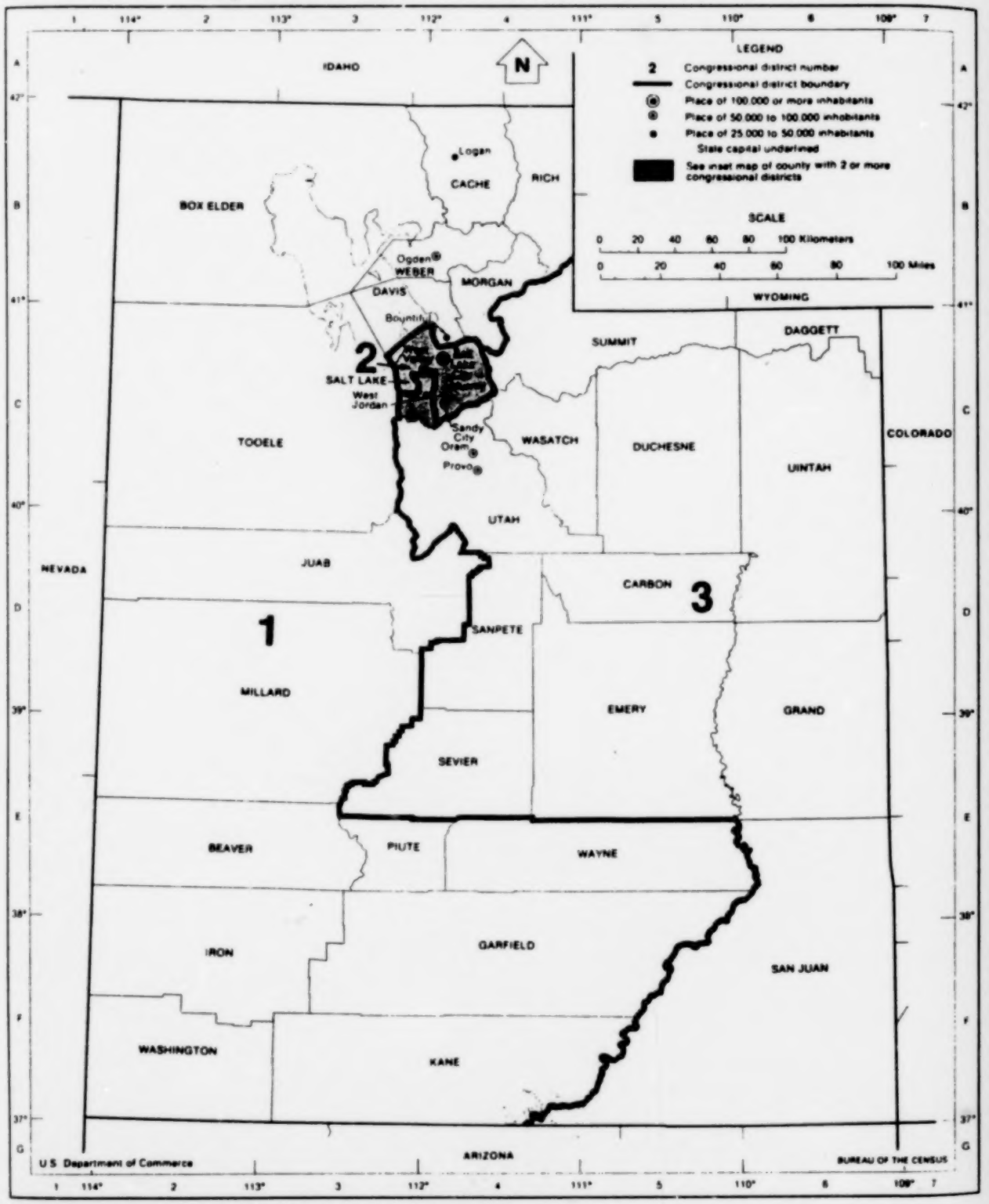
S-32

NEW MEXICO — Congressional Districts, Counties, and Selected Places — *(3 Districts)*



Appendix B

UTAH — Congressional Districts, Counties, and Selected Places — *(3 Districts)*



Congressional districts established January 1, 1982 ; all other boundaries are as of January 1, 1980

Appendix C